IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 195 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANUSINH PUJSINH JHALA

Versus

STATE OF GUJARAT

Appearance:

MR JV DESAI for Petitioner

MR BR GAJJAR ASST PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 15/02/2000

ORAL JUDGEMENT

#. This appeal arises from the conviction and sentence of the accused under Section 302 of the Indian Penal Code at the hands of the learned Sessions Judge, Sabarkantha at Himmatnagar in Sessions Case No. 58 of 1989. By order dated 6-2-1990, the learned Sessions Judge has sentenced the accused to suffer rigorous imprisonment for life and pay fine of Rs.100/- in default to suffer rigorous imprisonment for a period of one month.

#. The prosecution case, briefly stated, is that at around 5.20 a.m. on 29-6-1984 Dr. Ms. H.M. Shukla, a Medical Officer in the Civil Hospital at Himmatnagar, while on duty, received one Hansaben Kanusinh Jhala, the wife of the accused, aged around 25 years, on account of she having sustained burn injuries. Finding that the victim suffered extensive burns, Dr. Shukla admitted her in the emergency ward and on account of the fact that the case was one of medico-legal category, informed Himmatnagar Town Police Station by telephonic message. In the history which she collected she came to be informed that Hansaben was burnt at about 3.00 a.m. that day when she was in the veranda of her house.

#. Upon receipt of the telephonic message, Police Station Officer made necessary entry in the Station Diary, directed Head Constable Ganpatsinh Mulsinh to rush to the Civil Hospital and to do the needful. On going to the Civil Hospital, Ganpatsinh Mulsinh found that Hansaben was in Emergency Ward and under treatment. At around 6.30 a.m., Hansaben informed the said Head Constable that she was married with the accused around four years before that day, that her father-in-law died before about 3 years, that the accused had two brothers, that she did not have any child of the marriage, that she resided with the accused at Khariamrapur village, that before the festival of Holi she had gone to her parental home at Waktapur and then returned to Khariamprapur, that her husband did not like her ever since the time of marriage and that he was beating her; this treatment resulted in her going to her parental home in the previous year also, but her husband's brother Jituba brought her back home. She informed the Head Constable that on the previous day (28-6-1989) she and her husband in the Company of his brother went to the field for collecting the crop (Bazra - millet ears). Finding that Hansaben had put on slippers in her feet, the accused got enraged and had beaten Hansaben with the same slippers and leaving her and his brother in the field returned home. Thereafter Hansaben, the brother of the accused and his wife also returned home. Hansaben went to bed at about 10.00 or 11.00 p.m. after taking her meals and

attending to household work. The brother of the accused and his wife slept inside the house and the accused and Hansaben along with a small girl Krishna slept outside in the veranda of the house. The other brother of the accused, his wife and the mother of the accused went to sleep in some other house. The accused laid down in a cot along with a small girl Krishna whereas Hansaben rested on the ground placing some of her clothes by way of pillow. However, when she and her husband went to bed, her husband continued to quarrel with her while telling her to die by throwing herself in front of a running train or by throwing herself into a well. The accused thereafter picked up a tin container of red colour containing kerosene therein, poured it on Hansaben, who was resting on the ground and before she could realise what was happening, accused brought out match box and ignited fire on to the clothes of Hansaben. She raised sounds with the result that the brother of the accused and his wife and other persons rushed there and somebody poured water on burning Hansaben and the flames were put off. As several persons had gathered, accused also realised what happened, he, his mother and his brothers went to one Satish Prajapati, Sanskrut High School, borrowed his jeep car and had taken her to Himmatnagar Civil Hospital. She expressed before Head Constable that she was educated upto 5th standard and was fully conscious. This statement was reduced to writing by the Head Constable through his Writer Constable. Hansaben tried to sign that statement but on account of the burns she sustained, she could not sign and therefore her thumb mark was taken below the statement. In the meantime, the Police Station Officer had already sent a yadi to the Executive Magistrate. Mr. Chandulal Shivabhai Soni rushed to the hospital and recorded the dying declaration after verifying from the doctor on duty that Hansaben was in consciousness and was able to give her statement. She narrated the same story before the Executive Magistrate. It appears from the facts of the prosecution case that on June 30, 1989 Hansaben died in the hospital on account of the burn injuries, with the result that necessary postmortem examination was carried out. At the conclusion of the investigation the accused was charge sheeted and then tried after the case was committed to the Sessions Court.

#. The accused pleaded not guilty to the charge and his defence before the learned Sessions Judge was that of complete denial. He examined one witness in defence D.W.1 Narendrasinh Gulabsinh, Exh. 37, who happened to be a driver serving in the institution styled Sanskar Bharati at or around the time of the incident. According

to his say one Virsinhbhai summoned him at around 3.00 o' clock at night saying that Satishbhai was calling him informing him that wife of Kanusinh (accused) was to be taken to the hospital. He therefore had taken the jeep which he was driving (GAQ 5397) at the house of the accused where accused was not at home and he appeared thereafter about half an hour on someone having gone to call him. At that time Hansaben was in burnt condition and surrounded by village Sarpanch and other people. He reached near the victim when he heard her say to the people that she committed suicide by sprinkling kerosene on herself. She was taken into the jeep to the hospital where they reached at around 4.00 o' clock in the early morning, when she was admitted to the hospital and she was administered treatment by the doctor. At that time, she was conscious. The witness then went to Waktapur in his jeep. He was accompanied with aforesaid Virsinhbhai. They had informed the parents of the victim at Waktapur about the fact that Hansaben was burnt. On their way back they were accompanied with the accused's brother-in-law, father-in-law and two three other persons in the jeep. On their reaching the hospital, Hansaben's brother slapped the accused and told him that he would see him. Thereafter Hansaben's brother and father and other persons went inside the hospital and the witness left the hospital after about half an hour. It would appear from this evidence of the defence witness in his examination-in-chief that the accused wanted to canvass defence of suicide having been committed by his wife Hansaben.

#. At the conclusion of the trial and upon hearing the arguments of both the sides learned Sessions Judge upheld the prosecution charge of accused having committed murder of his wife Hansaben by burning her alive and imposed sentence upon him as aforesaid. That is how the accused is before this Court.

#. Mr. J.V.Desai, learned advocate represented the case of the accused and made his submissions, whereas Ms. B.R. Gajjar, learned A.P.P. made submissions in support of the conviction and sentence imposed against the accused. The evidence which has been adduced before the learned Sessions Judge has been read while commenting upon the same. Before the submissions are dealt with a brief synopsis of the evidence adduced before the learned Sessions Judge might be made.

#. The prosecution examined following witnesses:

1. Dr. Nitin Sadashiv Dongre, Exh.6

2. Jaswantsinhiji Becharsinh, Exh. 10 panch witness.
3. Dr. Hansaben M. Shukla, Exh. 18
4. Executive Magistrate, Mr. Soni Chandulal Shivlal, Exh. 20
5. Surajben Jethabhai, Exh. 23
6. Sardarsinh Ratansinh, Exh. 25
7. Virsinh Pratapsinh Rathod, Exh. 26
8. Ganpatsinh Mulsinh Exh. 27
9. Dalpatbhai Karsanbhai Vankar, Exh. 32

#. As stated above, the defence examined the aforesaid witness Narendrasinh Gulabsinh Jhala, Exh. 37.

#. The prosecution also relied upon the case papers of victim Hansaben, Exh. 19, telephone vardhi, Exh. 28, Postmortem notes, Exh. 9, Panchnama of the person of the accused, exh. 11, Panchnama of scene of offence, Exh. 12, Panchnama of the items found from the person of the victim, Exh. 13, Inquest Panchnama, Exh. 14, Yadi to the Executive Magistrate, Exh. 21, Panchnama of the person of the victim, Exh. 24 (when she was stated to be alive) and complaint Exh. 29.

##. Commenting upon the evidence of Dr. Hansaben M. Shukla, Exh. 18, it has been submitted that said witness has not named Kanusinh (the accused). On a reference having been made to case papers, Exh. 19, it has been submitted that there was mention of name of accused as the near relative who was present when the victim Hansaben was brought to the hospital. Presenting these facts from the aforesaid evidence, deposition of Dr. Hansaben has been read and commented. It has been submitted that although the doctor has deposed that the victim aged about 25 years was brought to the hospital by her relatives, that on collecting history from her, she informed that she was burnt with kerosene, that she was admitted in the Emergency Ward and necessary intimation was given to the police on telephone, that initial case papers were prepared by the staff of the hospital and thereafter the details were written by her, that on collecting the history, the victim informed the doctor that she was burnt at about 3.00 a.m. when she was in the veranda of her house, that upon the intimation received by the police, police rushed to the hospital and at that time the patient was in full consciousness, that she remained fully conscious till she died at about 4.35 p.m. on 30.6.1989, that the Executive Magistrate had also attended the hospital at about 8.30 a.m. and recorded the statement of the victim on which occasion, she had an occasion to give certificate that the patient

was fully conscious and was in a position to give her statement and that she had also signed yadi in that respect, the doctor has not categorically opined that the victim was in fully fit state of mind so as to give her statement. It may be noted from this evidence that the witness had no axe to grind either against accused or in favour of the victim. She had made a record of what she saw and observed during the course of treatment which she had given to the victim Hansaben. Even the case papers, Exh. 19 fully corroborate the witness. Very important circumstance which has been noted from case papers is that the accused was also present as a relative. It may be noted that along with accused other relatives from his side had also accompanied the victim to the hospital and at that point of time, none from victim Hansaben's parental side was present at the hospital. Therefore, upon assessment of the evidence of Dr. Hansaben M. Shukla, it hardly appears that although the victim had sustained extensive burns she was not in such a state of mind as to give her statement at one or the other point of time as can be seen from the facts of the prosecution case.

##. Commenting upon the evidence of Executive Magistrate, Soni Chandulal Shivlal, Exh. 20, it has been submitted that neither the witness was specifically empowered in respect of recording of dying declaration nor could be said to be a witness who could be relied upon. Besides, dying declaration which has been recorded by him is in the narration form and therefore no reliance should be placed upon the dying declaration recorded by this witness. Having gone through the dying declaration, Exh. 22 coupled with the oral testimony of the aforesaid witness it has to be noted that the facts narrated therein corroborate the facts which appear in the other statements and the evidence of the other witnesses. Broadly the victim has narrated the same facts as she narrated before Ganpatsinh Mulsinh, P.W. 8, Exh. 27. The witness has referred to Exh. 21 being the yadi. In answer to it, he had gone to the hospital. He has deposed that since Hansaben was fully conscious it was not necessary to record her statement in the form of questions and answers. The witness has then narrated the story which resemble broadly the facts set out in the opening part of this judgment. At around 7.15 in the morning of 29-6-1989, he received the aforesaid yadi and rushed to the hospital. It might be noted from his evidence that during the period between 8-12-1987 and 1989, he had been given special powers for recording of dying declarations. In the absence of any material extracted in the cross-examination it would be difficult

to appreciate and entertain the submission that the witness did not have special powers for recording of dying declaration. It has appeared in the cross-examination of this witness that he had reached the hospital at about 8.15 to 8.30 in the morning and the time of 9.00 `O' clock recorded in the dying declaration in exh. 22 was the time of completing the recording of dying declaration. He had also contacted Dr. Hansaben who upon having been asked by the witness informed the witness that victim Hansaben was conscious. She had also endorsed the necessary certificate to that effect. The witness also deposed that he did not know any of the relatives of either of the parties and at the time of recording of dying declaration only victim Hansaben Kanusinh herself was present. The acceptance of evidence of this witness by the learned Sessions Judge can hardly be faulted simply because the dying declaration was recorded in narration form.

##. The matter does not end there. Even P.W. 8, Ganpatsinh Mulsinh, the Head Constable who reached at the earliest point of time had an occasion to record the facts which victim Hansaben narrated to him. His evidence would indicate that Hansaben disclosed the aforesaid facts to him at the earliest point of time. When this witness reached the hospital it was around 7.30 a.m. He first saw Dr. Shukla. He also found relatives of the accused present in the hospital. According to his version in the cross-examination, none from the parental side of victim Hansaben was visible. He clarified that he was not knowing anyone of the relatives and therefore he could not say whether any one was present. Pausing for a moment here it might be noted that even the defence witness has come out with the facts which would indicate that the victim's parents, brother and other relatives from her parental side reached the hospital quite late and certainly after victim Hansaben had an occasion to disclose the fact about how she sustained burn injuries, before this witness. It would be clear from the cross-examination of the witness that the statement of the victim was recorded by this witness within the period of more than 15-20 minutes. The statement which is received in evidence appears at Exh. 29 and the same fully brings out the facts of the prosecution case stated at the earliest point of time.

##. Mr. Desai then commented upon the evidence of panch witness P.W. 2 Jaswantbhai Becharbhai, Exh. 10. This witness had been called as a panch near the residence of the accused for the purpose of preparing panchnama of the evidence of witness and collection of muddamal such as

burnt portion of earth where the victim was set on fire, the red coloured tin containing kerosene, the burnt clothes and the mattress and the burnt portion of the ceiling of the veranda. It has been submitted in respect of this panchnama that there has been no mention with regard to either survey number or house number, with the result that prosecution cannot be said to have established the very place of incident as narrated by the victim. This argument deserves to be rejected at the threshold for it has never been the defence that the victim sustained burns in some one else's house or at some other place.

There has been no cross-examination of witness Jaswantsinh Becharsinh Jhala and there is a reason why the evidence of this panch witness coupled with the panchnama to which he is the witness be not accepted.

##. Then there is reference to the evidence of P.W. 5, Exh. 23 Surajben Jethabhai. Referring to her evidence that on 29-6-1989 she was in the hospital on account of the fact that her son was ill, that when she had seen the victim down with burns on whole of her body, that no question was put to her, that she was not conscious, that she signed panchnama Exh. 24 accordingly, it has been submitted that the victim was not in fit state of mind. Now the time stated in Exh. 24 is 16.00 to 16.15 hours. This panchnama indicates that the victim was conscious and that she disclosed that she was burnt alive by her husband. It would appear from the evidence of the aforesaid witness that she has not supported the prosecution case qua the panchnama Exh. 24. However, that will not have any adverse effect of dislodging the prosecution case that when her dying declaration came to be recorded she was in fit state of mind. Besides, this witness had an occasion to act as one of the two panchas at around 4.00 to 4.15 p.m. on 29-6-1989. Much prior to that the aforesaid dying declarations of the victim had seen the light of the day.

##. No other evidence has been commented upon by the learned advocate for the appellant. However, he submitted that at the earliest point of time, namely, soon after the incident, the victim has not disclosed the facts of the prosecution case before anybody. However, it might be noted in this connection that all the relatives and the persons who were present by her side at her husband's house were from the side of her husband and it would be natural for her to keep silence and not to positively indict her husband at that point of time. It might further be noted that no sooner she was in the

company of independent persons such as Dr. Hansaben and Head Constable Ganpatsinh Mulsinh she disclosed the facts as to how she sustained the burn injuries.

##. The learned Sessions Judge has extensively dealt with the circumstances which lend support to the prosecution case as narrated by victim Hansaben in her dying declaration. The decisions which had been canvassed have also been succinctly considered by the learned Sessions Judge. Mr. Desai had nothing more to add to what has been discussed by the learned Sessions Judge except the submissions which have just been considered.

##. Mr. Desai however referred to the defence evidence as aforesaid. The defence witness Narendrasinh Gulabsinh Jhala has admitted in his cross-examination that he did not have any occasion to talk with victim Hansaben, that he had parked the jeep at a distance of around 25' from the house, that immediately victim Hansaben was brought to the jeep and she was taken to the hospital, that it took around an hour after Hansaben was admitted to the hospital when he had an occasion to start for Waktapur where he reached in that jeep after around 15 to 20 minutes, that it took around half an hour to forty five minutes for the relatives of Hansaben to be ready for going to the hospital at Himmatnagar, that it took around 20 minutes further for reaching the hospital at Himmatnagar, that all throughout he had an occasion to go by the jeep to all the places and he did not alight the jeep and continued sitting on the driver's seat, that he was acquainted with the accused, that he remained present on all the dates when the evidence was recorded and that he was required to appear as a witness on the summons received from the court, but his evidence was not recorded accordingly and even then he remained present in the court on all the dates when the evidence was recorded in the matter. The learned Sessions Judge has under such circumstances rightly discarded his evidence about Hansaben having disclosed that she committed suicide. In fact his cross-examination itself belies him. However, as stated above, a very important circumstance about victim Hansaben's parents and brother and other relatives reaching the hospital quite late in point of time and after her statement was recorded would assume great deal of importance. In our considered opinion, the learned Sessions Judge has rightly observed that the defence witness was taking interest in the defence with so much intensity that he was remaining consistently present on every adjournment though not required and that his evidence would run counter to the cause of defence.

##. Having gone through the entire evidence, the submissions of the learned A.P.P. that the prosecution story has remained consistent throughout the evidence and that it is quite natural deserve to be accepted.

20. In the result, this appeal fails. The same is accordingly dismissed.

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